

(3) IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-CARB-6-2023 (O&M)

Date of Decision:11.04.2023

Union of India

... Petitioner

Vs.

M/s HS Treohan and sons and another

... Respondents

CORAM : HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present : Mr. Shivoy Dhir, Advocate for the appellant.

HARPREET SINGH BRAR, J.

1. The appellant has filed the present appeal against the impugned judgment dated 05.12.2022 passed by learned Additional District Judge-cum-Commercial Court, Chandigarh whereby the petition filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”) has been dismissed and he has further prayed for setting aside the award dated 26.05.2015.

2. Facts of the case are that the contract agreement No.CE(AF) NGP/CHD-38/2006-07 was executed between the Union of India and M/s Treohan and sons for construction of the Bulk Shed for storing Aero Engine, Bulky items and allied services at Air Force Station Chandigarh. The lump sum contract amount was agreed to be sum of Rs.2,91,99,996.15/-. According to the contract, the work was to commence on 21.12.2006 and the same was to be completed on 20.12.2007. The respondent No.1 failed to complete the job within the stipulated

and applied for extension of time to complete the job on his own reasons. The

Union of India granted him extension upto 20.03.2010. After the completion of the work and payment of the final bill, the contractor has raised certain disputes and invoked condition 70 of IAFW 2249 General condition forming part of the contract for appointment of an Arbitrator to adjudicate upon this dispute. Accordingly, respondent No.2 was appointed as an Arbitrator and the disputes as raised by respondent No.1 were referred to him for adjudication. The Sole Arbitrator had made and published the award on 26.05.2015 granting the award in favour of respondent No.1.

3. The appellant challenged the award by filing an application raising objection under Section 34 of the Arbitration Act before the learned Additional District Judge-cum-Commercial Court, Chandigarh and the same was dismissed vide judgment dated 05.12.2022.

4. Learned counsel for the appellant has assailed the award dated 26.05.2015 as well as the judgment dated 05.12.2022 passed by learned Additional District Judge, Commercial Court, Chandigarh, on the ground that the Arbitrator has failed to publish the award within 6 months from the date of reference i.e. 23.03.2013. The award was published on 26.05.2015 that is even beyond the period of one year. The award was passed beyond the stipulated period under Section 29-A of the Arbitration Act, as such it suffers from incurable illegality and on this ground alone, the impugned award as well as the impugned judgment dated 05.12.2022 are liable to be set aside. He further argued that the learned Arbitrator-respondent No.2 has misconducted himself by ignoring the special condition No.39 of the contract where it is provided that the escalation in price of material is payable till the stipulated period and even for extended period as per the formula prescribed under W1 of special condition. Therefore, the respondent No.1-

Contractor was not entitled to material price variation during the extended period

since the appellant has already paid the escalation according to the formula given in the special condition stated above. He further assailed the award and judgment of the learned Additional District Judge-cum-Commercial Court, Chandigarh, on the ground that both forums have misread and mis-appreciated the evidence produced by the parties on file and have also misconstrued and misinterpreted the law applicable to the facts of the present case.

5. After hearing the learned counsel for the parties at length and having perused the record carefully, we are of the considered opinion that the present appeal is devoid of any merit and requires dismissal in view of the following discussion.

6. Undisputedly, all the claims except claim No.9 had already been implemented by the appellant and the payment has also been received by respondent No.1-Contractor. The above claim was passed on the ground of material loss suffered by respondent No.1-Contractor due to the delayed procurement of steel items because of non-availability and delayed decisions for the changes by the department concerned. A perusal of the record reveals that a detailed award running into 69 pages has been passed after considering the evidence produced on all the issues. The scope and ambit of judicial review of an arbitration award is a narrow one. This Court cannot upset the arbitration award by re-examining and re-appreciating the material available on record. In case, two views are possible, this Court is not justified in interfering with the award by substituting its finding with its own interpretation.

7. Learned counsel for the appellant has vigorously assailed the award on the ground that in the present case, the Arbitrator entered upon reference on 23.03.2013 and had made and published the award on 26.05.2015 which is beyond the maximum period prescribed under the Arbitration Act. He further assailed that

the Arbitrator had no mandate or authority to proceed beyond the expiry of the stipulated period and thereby the award is illegal.

8. The above stated arguments of the appellant are totally untenable and misconstrued. The bar contained under Section 29-A of the Arbitration Act is not applicable in the present case. The award was made and published on 26.05.2015 whereas Section 29-A of the Arbitration Act was brought in via amendment and it is applicable only from 23.10.2015. The objection of the appellant with regard to the passing of the award beyond the stipulated time is also misconceived as the appellant has continued to participate in the arbitration proceedings without even filing any objection with regard to the expiry of the mandate of the Arbitrator. In doing so, the appellant has waived his right to object to delay in passing of the award. In **Snehdeep Auto Centre vs. Hindustan Petroleum Corporation Limited;** **2012 (56) R.C.R (Civil) 40;** Division Bench of the Bombay High Court has examined this aspect and authoritatively held that the conduct of the authorities equates to waiver of the right to object the delay. In para-8, it has been observed as under:

“8. In the case at hand after the period stipulated of six months was over on November 3, 2006, the respondent made further submission in the arbitration proceedings on December 14, 2006. The respondent made further submissions on December 21, 2006. On March 3, 2007 the period of four months thereafter expired. Thereafter on March 12, 2007 both the parties therein submitted their Written Statement. In the written submission, the respondent did not contend that the mandate of arbitrator had come to an end. Thus, the respondent did not take a clear and unambiguous stand that, the arbitrator cannot proceed to declare the award as his mandate has come to an end. This conduct of the respondent amounts to clear waiver to the objection of time limit being mandatory requirement for pronouncement of the award. Making submissions and filing written submissions cannot be termed as formal steps but were integral part of the proceedings before the arbitrator. The respondents had opportunity, both at the time of making oral submissions on December 14,

2006 and December 21, 2006 to raise the contention that the mandate of the arbitrator has come to an end by efflux of time. Respondent also had an opportunity to put on record this contention in the written submissions filed on March 12, 2007. This conduct of the respondent amounts to clear waiver on their part to the condition of time limit stipulated in the agreement.”

9. Similarly, in the case of **Shyam Telecom Limited vs. Arm Limited;** **2004 (113) DLT 778**; it has been held as under:

“The principle of waiver is not new in the arbitration law as it was so far contained in the case law and has been codified in the statute. Besides, in the opinion of the Court the right to object the continuance of the proceedings on the ground of expiry of the stipulated period is one which falls in Part-I of the Act and which is derogable. The object of providing time limit for rendering an award by the Arbitrator is aimed at expeditious resolution of the disputes rather than to leave the disputes unsettled or inconclusive on the expiry of the stipulated period. Thus, looking at the matter from any angle, this Court is of the opinion that having regard to the entirety of the facts and circumstances, the perioner will be deemed to have waived its right to object about the continuation of the proceedings or alleging the termination of the mandate of the Arbitrator simply on the ground that the time prescribed under Article IV(3) of the Divestment Agreement for making the award had expired.”

10. Having considered the facts of the case, we find that from the conduct of the appellant that he kept sitting on the fence, waiting to seek advantage of the turn of events, a clear inference can be drawn that the appellant had waived his right to object regarding the jurisdiction of the Arbitrator to pronounce the award beyond the stipulated period.

11. It is a settled law that an appeal under Section 37 of the Arbitration Act is in the nature of second appeal and the Arbitrator is the final arbiter on facts and law. The scope of interference by this Court is limited only to the extent when the findings of the Arbitrator are contrary to the terms and conditions of the

contract or *ex facie* perverse which go to the root of the matter. Small errors, legal or factual, cannot be corrected in an appeal under Section 37 of the Arbitration Act. If two views are possible, the view of the Arbitrator has to pass the muster. Re-assessment of the evidence is not permissible.

12. The Hon'ble Supreme Court in **Mcdermott International Inc. vs. Burn Standard Co. Ltd and others**; 2006 (2) Arb. LR 498 (SC) has observed that:

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

13. In **Delhi Development Authority vs. RS Sharma and Company**; 2008 (3) Arb. LR 362 (SC), the following principles were laid down by the Hon'ble Supreme Court:

“(a) An award, which is:

i) contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996: or

ii) Against the terms of the respective contract; or patently illegal; or prejudicial to the rights of the parties, is open to interference by the court under Section 34 (2) of the Act.

(b) Award could be set aside if it is contrary to-

(a) Fundamental policy of India Law; or

(b) the interest of India; or

(c) justice or morality

(C) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the

specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the Public Policy of India.”

14. In view of the above discussion, we find that the learned Arbitrator has rightly passed the award in accordance with the provisions of the Arbitration Act and the learned Additional District Judge-cum-Commercial Court, Chandigarh, has passed a well reasoned judgment while dismissing the objection filed by the appellant under Section 34 of the Arbitration Act. Hence, the appeal is dismissed being devoid of any merit.
15. All the pending applications, if any, shall stand disposed of.

(Augustine George Masih)
Judge

(Harpreet Singh Brar)
Judge

11.04.2023
rajeev

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No